Lian Hup Manufacturing Co Sdn Bhd v Unitata Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R8–32–116–87
ZAKARIA YATIM J
15 FEBRUARY 1994

Arbitration *— Award — Setting aside — Misconduct — Arbitrator did not hear one party's witnesses — Whether irregularity could be rectified*

Arbitration *— Arbitrator — Powers of arbitrator — Whether arbitrator could award interest on debt — Civil Law Act 1956 s 11*

The applicant, Lian Hup Manufacturing Co Sdn Bhd, applied for an order, pursuant to s 23 and/or s 24 of the Arbitration Act 1952 ('the Act') and/or under the inherent jurisdiction of the court, that the award of the arbitrator dated 2 September 1987 be set aside; or alternatively, that the award be remitted to another arbitrator or arbitrators to hear the arbitration afresh. The applicant alleged that the arbitrator had misconducted himself in the course of the arbitration proceedings and relied mainly on the grounds that: (i) the applicant's witnesses were not heard by the arbitrator; and (ii) the arbitrator had exceeded his authority in awarding interest at different rates in respect of each year from 1984 to 1987.

Held, remitting the matter to the arbitrator for reconsideration:

(1) There was nothing in the record of the arbitration proceeding held on 22 May 1987 to show that the arbitrator refused to hear the oral evidence of the applicant's witness. However, it appeared that the award was made prematurely. That was only a mere irregularity which could be rectified and the court was satisfied that the irregularity would not have caused a substantial miscarriage of justice. The court must not be over ready to set aside awards unless there has been something radically wrong and vicious in the proceeding. In the present case, there was nothing radically wrong in the proceedings before the arbitrator.

(2) In the present case, the parties had agreed in the arbitration clause in their contract that the construction, validity and performance of it was to be governed by Malaysian law. Under s 11 of the Civil Law Act 1956, the court has the discretionary power to award interest for the recovery of any debt or damages. The arbitrator has the same power as that of the court to award interest at such rate as he thinks fit. Since it was within the discretionary power of the arbitrator to award interest in this case, the court would not interfere with the exercise of his discretionary power.

[**Bahasa Malaysia summary**

Pemohon, Lian Hup Manufacturing Co Sdn Bhd, telah memohon untuk suatu perintah di bawah s 23 dan/atau s 24 Akta Timbangtara 1952 ('Akta itu') dan/atau di bawah bidang kuasa sedia ada mahkamah, supaya award penimbangtara yang bertarikh 2 September 1987 diketepikan; atau secara alternatif, bahawa award itu diremit kepada seorang atau beberapa orang penimbangtara lain untuk mendengar timbangtara itu semula. Pemohon telah mengatakan bahawa penimbangtara telah salah laku semasa prosiding timbangtara dan bergantung terutamanya pada alasan bahawa: (i) saksi-saksi pemohon tidak didengar oleh penimbangtara; dan (ii) penimbangtara telah melebihi kuasanya apabila mengaward faedah pada kadar yang berlainan untuk setiap tahun dari 1984 hingga 1987.

Diputuskan, meremit perkara itu kepada penimbangtara untuk pertimbangan semula:

(1) Tidak terdapat apa-apa di dalam rekod prosiding timbangtara yang telah diadakan pada 22 Mei 1987 untuk menunjukkan bahawa penimbangtara enggan mendengar keterangan lisan saksi pemohon. Bagaimanapun, award itu nampaknya telah dibuat pramasa. Itu semata-mata suatu luar aturan yang boleh dibetulkan dan mahkamah berpuas hati bahawa luar aturan itu tidak mengakibatkan suatu salah laksana keadilan yang besar. Mahkamah tidak seharusnya terlalu bersedia untuk mengetepikan award-award kecuali apabila terdapat sesuatu yang sangat salah dan kejam di dalam prosiding itu. Di dalam kes ini, tidak terdapat apa-apa yang salah secara radikal dalam prosiding di hadapan penimbangtara itu.

(2) Di dalam kes ini, pihak-pihak telah bersetuju di dalam fasal timbangtara di dalam kontrak mereka bahawa pentafsiran, keesahan, dan pelaksanaannya akan tertakluk kepada undang-undang Malaysia. Di bawah s 11 Akta Undang-Undang Sivil 1956, mahkamah mempunyai kuasa budi bicara untuk mengaward faedah atas tuntutan untuk mendapat kembali sebarang hutang atau ganti rugi. Penimbangtara mempunyai kuasa yang sama seperti mahkamah untuk mengaward faedah pada kadar yang beliau fikirkan berpatutan. Oleh kerana penimbangtara mempunyai kuasa budi bicara untuk mengaward faedah di dalam kes ini, mahkamah tidak akan bercampur tangan dalam penggunaan kuasa budi bicara beliau.]

Notes

For cases on setting aside awards due to the misconduct of the arbitrator, see 1 *Mallal's Digest* (4th Ed) paras 596–603.

For cases on powers of the arbitrator, see 1 *Mallal's Digest* (4th Ed) paras 562–567.

Cases referred to

1 *Pegang Prospecting Co Ltd v Chan Phooi Hoong & Anor* [1957] MLJ 231 (not folld)
2 *Podar Trading Co Ltd, Bombay v Francois Tagher, Barcelona* [1949] 2 KB 277; [1949] 2 All ER 62 (not folld)
3 *Chandris v Isbrandtsen-Moller Co Inc* [1951] 1 KB 240; [1950] 2 All ER 618 (folld)
4 *Evergrip Prestressing Sdn Bhd v Ken Construction & Trading Sdn Bhd* [1991] 3 CLJ 2149 (refd)

L Parthiban (*L Parthiban & Associates*) for the appellant.
R Gomez (*Shearn Delamore & Co*) for the respondent.

Zakaria Yatim J: This is an application by Lian Hup Manufacturing Co Sdn Bhd pursuant to s 23 and/or s 24 of the Arbitration Act 1952 (Rev 1972), and/or under the inherent jurisdiction of the court, for an order that the award of the arbitrator dated 2 September 1987 be set aside; or alternatively, that the award be remitted to another arbitrator or arbitrators to hear the arbitration afresh.

The applicant alleged that the arbitrator had misconducted himself in the course of the arbitration proceedings:

(i) by conducting the proceedings without giving a fair hearing to the application and by failing to observe the rules of natural justice;
(ii) by not giving or refusing the applicant the opportunity to call witnesses to adduce oral evidence on its behalf; and
(iii) by improperly allowing submissions by counsel for the respondent to be admitted to consider the applicant's defence of waiver or variations of the terms and conditions.

The applicant further alleged that the arbitrator had exceeded his authority by awarding arbitrarily different rates of interests on various dates on the award without hearing any evidence in respect of interest from either party.

After hearing the submissions of both counsel for the applicant and counsel for the respondent and after considering the affidavit and the documentary evidence, I made the following order:

(1) The arbitrator should have given both parties the opportunity to give evidence of witnesses. The applicant did indicate its intention to give such evidence at the continued hearing. I think there is no waiver in this case. In the circumstances, the award is remitted to the arbitrator for his reconsideration.
(2) In view of (1) above, I direct that the applicant be entitled to half the taxed costs.

At the hearing of the application, Mr Parthiban, counsel for the applicant relied mainly on two grounds. He urged the court to set aside the award not only on the ground that the applicant's witnesses were not heard by the arbitrator, but also on the ground that the arbitrator had exceeded his authority in awarding interest at different rates in respect of each year from 1984 to 1987.

In support of his contention that the award be set aside, he cited *Pegang Prospecting Co Ltd v Chan Phooi Hoong & Anor*,[1] where the Court of Appeal of the then Federation of Malaya, decided that since the arbitrator decided only on questions relating to mining and refused to decide on questions of law, the award should not be remitted but must be set aside. Mr Parthiban also cited *Podar Trading Co Ltd, Bombay v Francois Tagher, Barcelona*,[2] where it was decided, inter alia, that the arbitrator could only give interest in circumstances in which it was recoverable at common law, namely, by agreement or by mercantile custom and there being no agreement or custom in that case, interest could not be awarded.

Mr R Gomez, counsel for the respondent submitted that there was no irregularity in the arbitration proceeding or in the award and asked the court to dismiss the application. He said that even if there was an irregularity no substantial miscarriage of justice had been caused. He told the court that *Podar Trading Co Ltd, Bombay v Francois Tagher, Barcelona*,[2] was overruled by the Court of Appeal in *Chandris v Isbrandtsen-Moller Co Inc*[3] on the question of interest. In that case, Tucker LJ, in his judgment at pp 262 and 263 said:

> Mr Mocatta argued that that judgment was based upon the assumption that it was the Civil Procedure Act 1833, which gave the arbitrator his power to award interest; that, once that Act was repealed, all such powers had gone; and that, unless the arbitrator were given fresh powers, he had none. I think that that was the reasoning in this judgment. But I agree with Mr Mocatta that the real basis of *Edwards v Great Western Ry* 11 CB 588 was not that the arbitrator derived his powers from the Act of 1833, but that he derived them from the submission to him, which necessarily gave him the 'implied powers' — referred to by Lord Salvesen; and I see no reason why, since the Act of 1934, an arbitrator should not be deemed impliedly to have the same powers. Therefore, with diffidence, having regard to the view expressed by the Divisional Court on this matter, I have come to the conclusion that in such a case as this the arbitrator has power to award interest. Accordingly, to that extent, I think, this appeal should succeed and *Podar Trading Co Ltd, Bombay v Francois Tagher, Barcelona* should on this point be overruled.

According to *Chandris* case,[3] the power of an arbitrator to award interest was derived from the submission to him which impliedly gave him power to decide all matters of difference according to the existing law of contract, exercising every right and discretionary remedy given to a court of law. The court decided that the arbitrator had the power to award interest.

In the present case, the parties have agreed in the arbitration clause in the contract (encl 1, exh LWH2) that the construction, validity and performance be governed by Malaysian law. Under s 11 of the Civil Law Act 1956, the court has the discretionary power to award interest for the recovery of any debt or damages. See *Evergrip Prestressing Sdn Bhd v Ken Construction & Trading Sdn Bhd*.[4] In my view, the arbitrator in the present case has the same power as that of the court to award interest at such rate as he thinks fit. Since it was within the discretionary power of the arbitrator to award interest in this case, the court would not interfere with the exercise of his discretionary power.

I shall now deal with the question of oral evidence. It is not in dispute that the arbitrator heard the oral evidence of the respondent's representative. I find nothing in the record of the arbitration proceeding held on 22 May 1987 (encl 1, exh LWH5) that the arbitrator refused to hear the oral evidence of the applicant's witness.

At the hearing of the arbitration on 22 May 1987 (LWH5 at p 17), Mr Parthiban, who was also counsel for the respondent/applicant then, requested for more time to file supplementary documents. The arbitrator adjourned the hearing and gave the applicant two weeks from the date of hearing to file their documents. But the applicant's reply to the claimant's documents is dated 16 June 1987 (LNH6). This means that the documents were filed on or after 16 June 1987, that is more than two weeks from the previous date of hearing. In his award, the arbitrator took into consideration the applicants reply dated 16 June 1987 and the documents exhibited thereto.

In my view, the award was made prematurely. This is only a mere irregularity which can be rectified. I am satisfied that this irregularity would not have caused a substantial miscarriage of justice. It has been said that the court 'must not be over ready to set aside awards where the parties agreed to abide by the decision of a tribunal of their own selection, unless we see that there has been something radically wrong and vicious in the proceeding' (*Russell on the Law of Arbitration* (20th Ed) at p 410). I find nothing radically wrong in the proceedings before the arbitrator.

I was satisfied that in the circumstances of the present case, the proper order was to remit the matter to the arbitrator for his reconsideration.

For the reasons I have already stated, I made the order as stated above.

Order accordingly.

Reported by Anne Khoo